

No. 2603

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC POWER COMPANY (a corporation),  
*Plaintiff in Error,*

VS.

P. R. SHEAFF,

*Defendant in Error.*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT  
COURT OF THE STATE OF NEVADA.

## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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Filed this.....day of September, 1916. SEP 13 1916

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By.....Deputy Clerk.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

The plaintiff in error most respectfully petitions this court for an order vacating and setting aside the judgment rendered herein August 14, 1916, and granting a rehearing of this cause.

It appears to us from a most careful and painstaking examination of the opinion that the decisive fact in this case, in the mind of the court, is that electricity will *jump* from wires carrying a high

voltage. This fact is made so prominent in the opinion, and referred to so often, that we feel sure it is the only thing that saved the case from a reversal. The conclusion is inevitable, from the reasoning of the court, that, if the accident happened as a result of *actual contact* with a live wire, the judgment appealed from would have been reversed. This peculiar quality is made the answer to the contention that the complaint does not state facts sufficient to constitute a cause of action; it is made the answer to the contention that the jury should have been instructed to find for the plaintiff in error; it is made the answer to the contention that the defendant in error assumed the ordinary risks of his employment; and it is made the answer to the contention that the defendant in error was guilty of contributory negligence.

That this is true will appear from the following quotations from the opinion. With respect to the contention that the complaint did not state facts sufficient to constitute a cause of action the court says:

“To sustain the argument of the plaintiff in error against the sufficiency of the complaint would be in effect to hold that an electrician’s helper is bound to know, as a matter of law, that a high power current of electricity is *liable to jump* from its conductor and pass through one who approaches too close to the conductor. We think it very clear that the law imputes no such knowledge to the helper of an electrician.” (Italics ours.)



Thus it appears that the complaint is sustained because of the liability of electricity to jump. The inference from the foregoing quotation is irresistible that an electrician's helper is bound to know enough not to come into actual contact with live electric wires.

In dealing with the contention that the case should have been taken from the jury, the court says:

“From his own testimony there can be no doubt that he knew better than to knowingly come in *direct contact* with a live wire, or other conductor of electricity; but that fact by no means sustains the contention of the plaintiff in error that the court should have taken the case from the jury by directing a verdict in favor of the defendant. \* \* \* The testimony of the plaintiff tended to show, among other things, that he was ignorant of the dangers attending working around or in the vicinity of live wires, and did not know and was not told that there was any danger of an *electric current jumping* from the live arms of the arrester in question if approached too close, and in this respect his testimony finds some corroboration in the testimony of Mr. Halpenny, the company's electrician, who sent him there. \* \* \* There was evidence tending to show that he *did not actually touch* the live arm, but in the nature of things he must have passed sufficiently close to it to attract the current; and there was positive testimony that such a voltage would jump at least  $1\frac{3}{4}$  inches from its conveyor.” (Italics ours.)

The liability of electricity to jump, therefore, was a vital consideration in holding the evidence sufficient to go to the jury.

In dealing with the defense of assumption of risk the court said:

“The testimony of the plaintiff and of the defendant’s witness, Halpenny, is, we think, amply sufficient to sustain the conclusion of the jury that the plaintiff did not assume the risks to which he was subjected, for not only did the plaintiff testify that he did not know and never was told that a current of electricity *would jump* from its wire or other conductor to and pass through a man who approached it too closely, but the jury might well have concluded from Halpenny’s testimony above quoted that the plaintiff had no such knowledge and was by no means familiar with the dangers attending work around or about high tension wires or pipes, extending so near the ground as to admit the current of electricity *leaving them* and passing to and through a human being who should touch or *approach too close* to the conveyor \* \* \* nowhere in Halpenny’s testimony does it state that he ever told the plaintiff that it was dangerous to pass *close* to the live arms of the arrester even if he *did not touch* them.” (Italics ours.)

Therefore it appears that the liability of electricity to jump is made the deciding factor in the defense of assumption of risk. The inference is plain from the decision (and such an inference is supported by the overwhelming weight of authority) that an electrician’s helper, especially one who acknowledges “that he knew better than to knowingly come in direct contact with a live wire or other conductor of electricity,” assumes the risk of danger to himself from such contact. There can be no doubt, we think, that if the accident had

happened through actual contact with the live wire the defense of assumption of risk would have been held to be completely established.

Upon the defense of contributory negligence the same prominence is given to this peculiar quality of electricity. The court says:

“It is true that a danger sign was posted on the door of the transformer building, and it seems that a similar notice was posted on a post of the structure but it is not pretended that either sign contained any notice that there was any danger of the current of *electricity jumping* from the live arm to a person only passing it, even if very close. There is nothing in the evidence indicating that the plaintiff voluntarily or even carelessly came into *actual contact* with either of the live arms; on the contrary, the bubble shown by the evidence on the lower end of the arm from which the plaintiff received the shock, indicates that the *current leaped* to him, and as said by the trial court, the nature and location of the injuries on the plaintiff’s person, as shown by the evidence, tended to corroborate that theory.” (Italics ours.)

There can be no doubt, therefore, that if the defendant in error had actually come into contact with the live wire he would have been held guilty of contributory negligence as a matter of law.

Assuming that we are correct in our analysis of the opinion, we are confident that a grave error has been committed by the court. We feel sure that if the court will patiently review the record and the briefs it will conclude—



1. That the complaint does not state a cause of action *based upon the theory of the liability of electricity to jump*; and

2. That the evidence does not show, even prima facie, *that the electricity did jump*.

If it can be shown that the evidence is insufficient to prove that the electricity *did* jump, or if it was not proven that such jumping was the proximate cause of the injury it will necessarily follow—

1. That the defense of assumption of risk is completely established, and

2. That contributory negligence is shown as matter of law.

We propose, with the kind indulgence of the court, to discuss the foregoing propositions and, in view of the importance of this litigation to the plaintiff in error (for the evidence shows that it is but a small, struggling concern) strongly urge upon the court its full and patient reconsideration.

Before doing so, however, we wish to call particular attention to certain mistakes and inaccuracies in the court's statement of the allegations of the complaint and in its statement of the evidence. These mistakes are of such a character as to be of great materiality in view of the fact that the case is such a close one, depending, as it clearly appears, upon the single question as to whether the electricity did or did not jump; or depending, in other words, upon whether the defendant in error touched or did not touch the live wire in question.



Referring to the complaint the court says:

“The action is based upon the ground that the place where the plaintiff was put to work was not a safe place, for the alleged reason that the lightning arrester was defectively constructed and maintained by the defendant in the particulars set out in the complaint, and as constructed and maintained was dangerous, *of which dangers the plaintiff did not know and was not warned*, and that in the course of his employment in passing the live arms of the arrester an electric current therefrom of tremendous voltage inflicted upon him the injuries for which he sued.” (Italics ours.)

There is no allegation in the complaint that the plaintiff *was not warned* of the dangers of his employment. The complaint may be searched in vain for an allegation of that character (Record, Vol. I, pp. 1-8). Neither is there a *direct allegation* that the plaintiff did not know of the liability of electricity to jump. Nor is there any allegation that the electricity did in fact jump.

If the complaint had unequivocally alleged that plaintiff received his injuries by reason of the electricity jumping from the wire to his body the situation might have been different. But the complaint contains no such allegation. The equivocal allegation is made that plaintiff “came either in such *close proximity to* or *in contact with* one of the said arms of such lightning arrester whereupon” etc.

As all complaints are construed most strongly against the pleader this cannot be considered as an

allegation that the electricity *jumped* from the wire and injured the defendant in error.

When this court, therefore, said that

“To sustain the argument of the plaintiff in error against the sufficiency of the complaint would be in effect to hold that an electrician’s helper is bound to know as a matter of law that a high power current of electricity is liable to jump from its conductor and pass through one who approaches too close to the conductor,”

we feel (and we say it with due respect) that the allegations of the complaint were clearly misstated and misconstrued. The seriousness of this mistake will be shown hereafter.

In discussing the evidence the court says:

“At the time in question this lightning arrester had not been completed—the dead arms not being connected in any way with the ground. Nevertheless, connection with the high tension feed wires had been made, and in consequence the arrester, though incapable of performing its functions, was charged with the full voltage of electricity on the high tension wires amounting to about 55,000 volts. It was to prepare for connecting the dead arms on the opposite side of the transformer building with the ground that the plaintiff was sent by Halpenny to the Fairview substation to dig the holes under each of the dead arms, and into each of the dead holes he was to put a cement block that he took with him.”

This statement of the evidence is erroneous. *The dead arms were connected with the ground and the lightning arrester was capable of performing its*

*functions.* When it was first constructed the dead arms were connected directly with wires laid in a trench in the ground. These wires were carried to an abandoned shaft some distance away and connected with a copper plate which was lowered into the shaft, thus forming a ground. Being thus completed the current was turned into the substation and the lightning arrester was in shape to take care of any surge upon the line from lightning or any other cause. Mr. Halpenny was not satisfied with the ground wiring thus provided, and decided that a more satisfactory ground could be made by using the cement blocks. The idea was that the cement blocks would furnish more resistance, thus cutting off the current more quickly after the subsidence of a surge. Therefore when Sheaff went to do his work the lightning arrester was complete and in operation, which he well knew.

In considering the evidence the court evidently considered that the plaintiff in error was at fault in charging the live arms of the lightning arrester with the full voltage of electricity then on the high tension wires when—as the court thought—the contrivance was in an uncompleted state. The court might well have thought it improper for an employer to set an employee at work upon an uncompleted contrivance charged with electricity, while, on the other hand, it might have been entirely proper to set him at work upon a completed operating contrivance known to the employee to be oper-

ating and charged with electricity. We feel that this mistake is sufficiently important to be corrected.

The court further says in its opinion:

“There was positive testimony that such a voltage would jump *at least*  $1\frac{3}{4}$  inches from its conveyor.” (Italics ours.)

This is a mistake. The evidence is that the current would jump *at most*  $1\frac{3}{4}$  inches from its conveyor. All of the experts agree upon this. Tables were introduced in evidence showing the different distances to which electricity would jump at different voltages, and all the witnesses agreed that  $1\frac{3}{4}$  inches was the outside limit even under the most favorable conditions (Record, Vol. II, p. 308, fol. 113). A man's body is not a good conductor, and therefore it was not likely that electricity would jump  $1\frac{3}{4}$  inches to a man's body. It would only jump that distance to a good conductor such as a metal ball (Record, Vol. II, pp. 307-308, ff. 109-113).

The evidence showed that the live and dead arms of the lightning arrester were  $4\frac{1}{4}$  inches apart. It would require a heavy load of static electricity resulting from lightning to cause the current to jump that distance. That was the very principle upon which the lightning arrester worked. When the voltage became sufficiently high the electricity would jump from the live to the dead arms of the lightning arrester and find its way to the ground,



thus relieving the pressure upon the wires until normal conditions were resumed.

Therefore the evidence amounts to a demonstration that Sheaff was less than  $1\frac{3}{4}$  inches away from the live arm of the lightning arrester when he was injured. Even if this evidence were to be ignored he could not have been more than  $4\frac{1}{4}$  inches away because if there had been a surge at that moment the electricity would have jumped to the dead arm of the lightning arrester instead of to Sheaff's body. But no question of a surge can enter into this case because there was no lightning, the day being a clear and pleasant one. Furthermore, the records at the power house were introduced in evidence and showed that there had been no surge upon the wire from any cause whatever.

The court in deciding the case was evidently under the impression that electricity would jump for a considerable distance, the opinion stating that it would jump *at least*  $1\frac{3}{4}$  inches. The court does not state how far it would jump, and we are thus left in the dark as to the court's view upon that subject. If electricity would jump six or eight inches or a foot, Sheaff's conduct might be excusable, and his employers inexcusable in setting him to work without warning of such a danger. But as it would jump at most  $1\frac{3}{4}$  inches it would seem that Sheaff's conduct is inexcusable in going so very close to a wire carrying, to his knowledge, such a high voltage. If Sheaff, as the court admits, had sufficient knowledge to avoid actual contact

with a live wire he certainly should be required to exercise a sufficient degree of care *to remain far enough away from such a wire to avoid an ACCIDENTAL contact*. Negligence on his part would not consist only in actual voluntary contact with such a wire. It would be just as much negligence if he carelessly allowed himself to get so close to a live wire as to come into contact with it *accidentally*.

Therefore we say that this mistake on the part of the court as to the distance electricity would jump is of vital importance in this case.

The court further says:

“Besides it does not appear that the arrester at the Wonder Station was connected with the high tension wires at any time prior to the digging of the holes.”

By referring to page 154, folios 150-151, volume I, of the record, the court will see that this statement is a mistake and that the lightning arrester at the Wonder Station was connected and in operation and that Sheaff knew it.

We shall now proceed to discuss the propositions hereinabove mentioned.

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## I.

**THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION BASED UPON THE THEORY OF THE LIABILITY OF ELECTRICITY TO JUMP.**

In cases of this character nothing is better settled than that there is no obligation resting upon

an employer to instruct or warn an *experienced* employee.

*Dunbar v. Hollingsworth*, 84 Atl. 992, 994;  
*O'Connor v. Atchison etc. Co.*, 137 Fed. 504,  
 505.

An employer is entitled to assume that such an employee needs no instruction or warning (*Dunbar v. Hollingsworth*, *supra*). He may also assume that such an employee appreciates the ordinary dangers of his employment (*Dunbar v. Hollingsworth*, *supra*). On the other hand, an inexperienced and ignorant employee is entitled to warning and instruction where the employer knows of such inexperience and ignorance.

*Dunbar v. Hollingsworth*, *supra*;  
*O'Connor v. Atchison T. & S. F. Ry. Co.*,  
 137 Fed. 504, 505;  
*Reed v. Stockmeyer*, 74 Fed. 186-190, and  
 cases cited.

In the present complaint, however, there is no allegation of *knowledge* on the part of the employer that his *experienced* employee did not know of the dangers of his employment.

Therefore it appears to us that the complaint is radically defective in the following particulars:

1. There is no allegation that the defendant in error was an *inexperienced* employee or was hired as such.

2. There is no allegation that the plaintiff in error *knew* of any want of experience of defendant in error, or of any lack of knowledge on his part of the dangers of his employment.

3. There is no allegation that the defendant in error *was not warned* of the dangers of his employment.

The court says:

“We also agree with the court below that ‘cases of this kind differ from those which have been cited where the danger was open and apparent to one in the exercise of his ordinary senses. A live wire or a live pipe, such as we have in this case, is not like an opening in the floor, or a rapidly revolving wheel, which people may see and avoid. A live wire is quite as innocent in appearance as a dead one; it gives no warning before it deals the fatal shock’.”

From this quotation it would seem that the court regarded the danger to which defendant in error was exposed as a *latent* or *concealed* one. The inference from the entire opinion is that an electrician’s helper is entitled to go as near as he pleases to a wire which he knows, or is in a position to know, is carrying an exceedingly high voltage of electricity. The idea seems to be that because such a wire is “innocent in appearance” an electrician’s helper may take any sort of chance he pleases in its immediate vicinity *so long as he does not touch it*.

We take direct issue with the court on this question, and rely upon the case of *Law v. Central Dist.*



*P. & T. Co.*, 140 Fed. 558, 564, 565, wherein it was decided that an employee is held to the same standard of care in handling a wire which he assumes to be "dead" as he is bound to exercise in handling one known to be "live". The authorities are legion to the effect that in this day and age everybody is presumed to know something of the dangers of electricity.

*Andrews v. Valley Ice Co.*, 167 Cal. 11, 20, 21;

*Dunbar v. Hollingsworth, etc. Co.*, 84 Atl. 992, and cases cited in briefs on file.

If so, certainly an electrician's helper should be charged with sufficient knowledge and discretion, as matter of law, to keep farther away from a live wire than one inch and three-quarters. Even a child who knows enough not to voluntarily *touch* an electric wire should be expected to keep far enough away to prevent an *accidental* touching.

We think that the last sentence quoted above should have read as follows: "A *dead* wire is quite as *dangerous in appearance* as a live one." In a country and in an age where live electric wires are on every hand, any wire strung upon poles, dead or alive, is in itself a danger signal (*Dunbar v. Hollingsworth*, *supra*).

To illustrate:

A man is skating on ice. It is thick in some places and thin in others. The thin places are just as innocent in appearance as the others. Is the

skater entitled to assume that all the ice is thick because it is "innocent in appearance"?

Another illustration:

A day or two ago a woman was wading in shallow water. There was a deep hole made by a dredger into which she stepped and was drowned. Near the hole was a sign marked "Danger". The deep water was just as "innocent in appearance" as the shallow. Was she justified in assuming that it was all shallow because of its innocent appearance?

The ordinary man or boy should not experiment with a wire to determine whether it is alive or dead. He should assume that it is alive and avoid contact with it. Neither should he assume that the ice is all thick nor the water all shallow.

The decisions of all the courts *require* any ordinary person to avoid contact with electric wires. Why, then, should an electrician's helper, who is supposed to know so much more about electricity than the ordinary man, be excused from taking the course which the law imposes upon an ordinarily constituted individual?

But even considering the propensity of electricity to jump from a wire carrying a high voltage as a concealed or latent danger, still the complaint does not state a cause of action, because it does not charge that the danger was latent or concealed, or that the employer, knowing of such latent and concealed danger, and knowing of plaintiff's igno-

rance thereof, nevertheless exposed him to it, or that if it did such neglect proximately caused injury.

See in this connection

*O'Connor v. Atchison T. & S. F. Ry. Co.*, 137 Fed. 504, 505.

In all the authorities we have examined, danger from live electric wires is considered as obvious and patent unless there are special circumstances showing concealment of the wires or defective insulation, or unless there were facts alleged and proved which excused ignorance of danger upon the part of the injured person.

*Law v. Central Dist. P. & T. Co.*, 140 Fed. 558.

But here the live wire was in plain view and there is no allegation in the complaint to the contrary. No allegation to the contrary could have been made with truth, because the connections between the live arms and the high tension wires above were in plain view. No allegation that the plaintiff did not know the wires were carrying electricity could have been made with truth, because he admits he heard the humming of the transformers and knew the current was passing through the wires to them.

The court does not seem to consider that an electrician's helper is charged with the same amount of knowledge of the dangers of electricity as a lineman. Conceding this it simply means that he

should have been warned by the employer. If so, the complaint should have set forth lack of warning. The court says the complaint contains such an allegation. We have shown that the complaint does not. An allegation of lack of warning, therefore, was vital to the cause of action. If so—and we cannot see how it can be otherwise—a rehearing is necessitated because the decision is based upon this misconception of the allegations of the complaint.

We have already adverted to the failure of the complaint to charge that the electricity jumped from the wire to plaintiff's body. In this connection it states that the plaintiff "came either in such close proximity to *or* in contact with one of said arms" etc. If the plaintiff came in "close proximity to" the wire and the current thereupon jumped (which is not alleged), it might reasonably be held that a duty to warn an ignorant employee of such propensity rested upon the employer. But even in such a case, an allegation of lack of warning would be necessary to state a cause of action. On the other hand, if the complaint means that plaintiff came "*in contact* with one of the arms of said lightning arrester" then there was no duty resting upon the employer to give him any warning whatever, and it makes no difference whether the complaint contains an allegation of warning or not.

Judging from the allegations of the complaint, how did the accident actually happen? What was the proximate cause of plaintiff's injury? Was it



the jumping of the electricity or was it the result of actual contact? The complaint does not answer these questions and therefore does not allege any proximate connection between the negligence charged and the injury.

Negligence in and of itself is innocuous. Where there is no causal connection shown between negligence and an injury, no cause of action is alleged. In pleading a cause of action for damages for negligence the necessity to set forth the facts showing a direct causal connection between the negligence alleged and the injury is really greater than the necessity of setting forth the facts showing negligence. This has been several times held in this state.

*Smith v. Buttner*, 90 Cal. 95, 99;

*Crabbe v. Mammoth C. G. Min. Co.*, 168 Cal. 500, 505;

*Merrill v. L. A. Gas & E. Co.*, 158 Cal. 499, 503, 504;

*McKune v. Santa Clara V. M. & L. Co.*, 110 Cal. 480, 486;

*Schwartz v. Cal. Gas & E. Co.*, 163 Cal. 398.

What was the causal connection between the negligence alleged and the injury? Was it the jumping of electricity or actual contact? If the former, one principle of law applies; if the latter, another.

As we understand the opinion, if the electricity jumped the judgment should be affirmed. If the injury occurred through actual contact it should be reversed. Is it not of the first importance, there-

fore, that the complaint should set forth a clear, specific and straightforward cause of action, as the line is so finely drawn between liability and non-liability? And is it not also of the first importance that a judgment should not be permitted to stand where the complaint does not in fact allege lack of warning—a *necessary* allegation?

For the purpose of demonstrating the propositions hereinbefore so positively asserted, we here recite some of the authorities cited in our briefs.

*Looney v. Metropolitan R. Co.*, 200 U. S. 480;  
*Andrews v. Valley Ice Co.*, 167 Cal. 11, 20, 21;  
*Felton v. Girardy*, 104 Fed. 127;  
*Kohn v. McNulta*, 147 U. S. 238;  
*Tuttle v. Detroit etc. Co.*, 122 U. S. 189;  
*Blick v. Olds Motor Works*, 141 N. W. 680;  
*Dunbar v. Hollingsworth etc. Co.*, 84 Atl. 992,  
 994.

From the foregoing it must be perfectly clear that an allegation as to warning or lack of warning is of vital importance in the statement of a cause of action. If so, the complaint in this case is fatally defective because it does not contain any such allegation.

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## II

THE EVIDENCE DOES NOT SHOW, EVEN PRIMA FACIE, THAT  
 THE ELECTRICITY DID JUMP.

As already shown the complaint does not specifically charge that the current jumped from the wire

to the body of defendant in error. The allegation is in the disjunctive, the complaint stating that the plaintiff came either in close proximity to *or* in contact with the wire, thus receiving the current. But whether he received it from actual contact or through the jumping of the current is not alleged.

The court, however, in considering the case, has evidently adopted the theory that the complaint sufficiently alleges that it jumped, and, as shown by the above quotations from the opinion, has affirmed the judgment on that theory. Certain it is that the court did not affirm the judgment on the assumption that Sheaff came into actual contact with the wire.

In considering the evidence, therefore, we must do so *on the assumption that there is a sufficient complaint charging that the electricity jumped to the body of the defendant in error*. From our point of view this is a violent assumption but it must be indulged in view of the court's ruling that the complaint states a cause of action.

If, therefore, we assume that the complaint states such a cause of action it follows that the evidence must be sufficient to sustain that cause of action. In other words, the evidence must be sufficient to show that the electricity jumped, otherwise the material allegations of the complaint are not proved.

In its opinion the court says:

“There was evidence tending to show that he did not actually touch the live arm, but in

the nature of things he must have passed sufficiently close to it to attract the current."

Again:

"There is nothing in the evidence indicating that the plaintiff voluntarily, or even carelessly, came into actual contact with either of the live arms; on the contrary, the bubble shown by the evidence on the lower end of the arm from which the plaintiff received the shock indicates that the current leaped to him, and as said by the trial court, the nature and location of the injuries on the plaintiff's person, as shown by the evidence tended to corroborate that theory."

With all due respect we urge that the court has drawn erroneous conclusions from the uncontradicted evidence.

We assert that there was no evidence tending to show that he did not actually touch the live arm; or that the presence of the bubble indicated that the current leaped to him; or that the nature and location of the injuries corroborated that theory. The only evidence referred to by the court which tended in the remotest degree to show that the current leaped to the plaintiff's body is the bubble appearing on the end of the arm nearest plaintiff, and the nature and location of the injuries on plaintiff's person. No other evidence could have been referred to because there is none in the record. The facts as shown by the uncontradicted evidence are as follows:

Witness Schrugum testified that the bubble indicated that the current had left the wire at that



point; that it could have jumped from the wire at that point or that the same bubble would be shown if there had been actual contact at that point.

At Volume II of the record, page 306, folios 105 to 108, inclusive, the witness Scrugham, an electrical expert produced by the plaintiff, testified as follows:

“Applying that principle to the case in hand, and assuming that a person came in contact with the point of the wire or pipe in question, and then either fell away or drew away, that arc would be formed on the same principle as the make and break spark. After the voltage reaches a certain amount, a distance of a fraction of an inch makes very little difference. In either case there would be the arc, fire and burning resulting. *That might have the effect of leaving its mark on the wire in either instance. In the case of either the jump or actual contact and drawing away that arc would present actually the same appearance in either instance.* The clothing of a person under those circumstances coming either within the jumping zone or the actual contact would probably cause a spreading of the arc, particularly if he had very moist clothing, either perspiration or otherwise; or if he had large metallic buckles on his back in suspenders, and that spreading would be practically the same, whether it was a contact case or a jump case. *If a person, for instance, came into actual contact with that wire at a point in his back to the right of the spinal column and under the right shoulder blade, practically at that point, and there received his first burn; and in dropping were to fall somewhat in the manner you are indicating, so that the wire would run up along the back, and to*

*the shoulder, it might produce the effect that was described by me to counsel in his question, as to the several different electrical burns."*

It appears, therefore, that the bubble did not indicate that the current jumped any more than it indicated actual contact. The bubble would have been formed in either event. Consequently no particular significance can be attached to the bubble. It could prove one thing as well as the other and the probabilities were not in favor of either as against the other.

Neither did the nature and location of the injuries tend to show in the slightest degree whether the current jumped or whether there was actual contact (Record, Vol. II, p. 306, ff. 106-107). The defendant in error was about six feet six inches tall. He had been engaged in heavy manual labor and was perspiring freely, his skin and shirt being therefore more or less salty. Salt water furnishes a good conductor for electricity (Record, Vol. II, p. 320, f. 142). Standing erect the end of the live arm would probably come into contact with defendant in error at about the base of his neck. He had deep scars at that point and on the top of his shoulder, as well as other burns farther down his back. If he came into actual contact with the live arm he of course immediately dropped limp and inert to the ground. Dropping would separate him from the live arm, thus drawing an arc which could be stretched for an indefinite distance and which could, according to the testimony, change its position on his person (Record, Vol. I,

p. 304, f. 102). Arcs of that character will move about, as shown by the testimony in relation to arcs formed when a lightning arrester is in operation. When a current of electricity jumps from a live to a dead arm of a lightning arrester an arc is formed, and as long as that arc persists or exists the current continues to flow through the arc. On account of the peculiar construction of a lightning arrester, however, the arc rises and elongates, finally breaking and thus stopping the flow of current after the surge is over. If plaintiff came into actual contact with the wire and then fell, such an arc could have been formed and could have changed its position on his person, in view of the fact that his skin and perspiration soaked shirt were probably at that time a good conductor.

On the other hand, if defendant in error had not touched the point of the live arm and had walked into a position where his shoulder was within one inch and three-quarters of it the electricity might have jumped to his body and thus formed an arc. Of course he would in that event immediately fall to the ground and the arc would naturally act in exactly the same manner as one formed by actual contact.

Therefore, it seems perfectly clear that the nature and location of the injuries cannot tend at all to show that the current jumped.

This view of the evidence is fortified by the location of the various scars on plaintiff's body. They were widely separated. Some were on his



neck and shoulder, others in the middle of the back, and still others in the lower part of the back. It would have been an impossibility for electricity to jump to his shoulder and also jump to the middle of his back and to the lower part thereof. This is true because to do so it would have to jump over a space of from a foot to two feet, and the evidence is uncontradicted that it could not jump more than an inch and three-quarters under the most favorable conditions here (Record, Vol. I, p. 295, f. 882).

The evidence amounts to a demonstration that after the first shock or charge the arc thus formed moved about on plaintiff's body but was finally broken by his fall to the ground, and that it could have moved about as well after actual contact as after leaping to plaintiff's body.

Of course it will not be disputed that the burden rested upon defendant in error to prove negligence and a causal connection between such negligence and his injury. The burden, under the court's interpretation of the complaint, rested upon defendant in error to show that the current *leaped* to him. *This burden is not sustained by showing that it either leaped or that there was actual contact.* The evidence to sustain the verdict must have tended to show one of these facts to the exclusion of the other, or must have weighed heavier in favor of one than the other. If upon a fair and impartial view of the evidence it tends to sustain one theory



to precisely the same extent as the other the case is not made out.

*Patton v. Texas etc. Co.*, 179 U. S. 658, 663, 664.

In the last analysis it would seem that the court, in deciding that the evidence was sufficient to show that the current leaped, relied upon the testimony of Scrugham as to the bubble. But the court's attention was probably not called to the other part of Scrugham's testimony wherein he stated that the bubble might indicate either the one thing or the other without preference to either.

Of course we realize that where injuries were sustained of such a fearful nature there must be a natural hesitation on the part of any court to set aside a verdict awarding damages. On the other hand, it must be remembered that the plaintiff in error is a small struggling concern, heavily in debt; that it paid Sheaff's expenses for months after the accident and offered to take him to California and have an operation performed which might have benefited him greatly; and that while accepting assistance from plaintiff in error, defendant in error already had his attorney engaged and was collecting evidence preparatory to filing suit.

In the light of these facts, while they have no influence upon the legal propositions involved, we feel that where the line between liability and non-liability is so finely drawn we should at least have an opportunity of regarding the case and demon-

strating to the court, if possible, that no legal liability has been made out.

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### III.

#### THE DEFENSE OF ASSUMPTION OF RISK IS ESTABLISHED BY THE UNCONTRADICTED EVIDENCE.

Here again we are confronted with the same question, namely, the leaping of the current. The court freely admits that "there can be no doubt that he (Sheaff) knew better than to knowingly come in direct contact with a live wire or other conductor of electricity".

If, therefore, he did come into actual contact with a live wire he assumed the risk of so doing and cannot recover. The court clearly decides this defense upon the theory that there was no actual contact but that the current jumped to plaintiff's body. We have already endeavored to show (and we think successfully) that the evidence fails to prove that the current did leap any more than it establishes actual contact.

Assuming that it is sufficient to show either one or the other but neither to the exclusion of or in preference to the other, where does this leave us?

If it did leap, according to the court's conclusion the risk was not assumed. If there was actual contact the conclusion from the court's reasoning is irresistible that the risk was assumed. The evidence shows without conflict that there was either

a leaping or actual contact, but does not show which. The evidence also shows without conflict that if there was actual contact the plaintiff cannot recover. Therefore is not the plaintiff's case absolutely destroyed unless some tangible evidence can be pointed to in the record showing that there was a leaping of the current rather than an actual contact?

Let us assume that the evidence sufficiently shows either a leaping *or* actual contact. Let us also assume that this evidence, under the pleadings, considered apart from the defense of assumption of risk, would make a *prima facie* case of liability. Sheaff's experience and knowledge preclude his recovery, as against this defense, if there was actual contact. In other words, he assumed the dangers incident to actual contact. Therefore, upon the whole case, liability is not made out. The *prima facie* case is destroyed because the evidence fails to prove the leaping to the exclusion of actual contact.

As before shown, the complaint does not state a cause of action on the theory of actual contact because plaintiff was an electrician's helper and therefore an experienced man who needed no instruction or warning with reference to the danger of actual contact. The only theory upon which the plaintiff is enabled to be in court at all is that the complaint states a cause of action by reason of the leaping propensity of electricity.

If, therefore, the evidence fails to establish that the current leaped, but is just as strong to the point that there was actual contact, the evidence taken as a whole must be held to sustain the defense of assumption of risk.

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#### IV.

#### THE EVIDENCE SHOWS THAT DEFENDANT IN ERROR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

Once more we are confronted with the same question of a leaping current of electricity. There is no escaping the conclusion that if Sheaff actually touched the live arm of the lightning arrester he was guilty of contributory negligence. He is held guiltless of contributory negligence because of the court's opinion that the electricity jumped, and that there was no actual contact.

The court says:

“It is true that a danger sign was posted on the door of the transformer building and it seems that a similar notice was posted on a post of the structure, but it is not pretended that either sign contained any notice that there was any danger of the current of electricity jumping from a live wire to a person only passing, or even if very close. There is nothing in the evidence indicating that the plaintiff voluntarily or even carelessly came into contact with either of the live arms; on the contrary, the bubble shown by the evidence on the lower end of the arm from which the plaintiff received the shock indicates that the current leaped to him, and as said by the trial court,



the nature and location of the injuries on the plaintiff's person, as shown by the evidence, tended to corroborate that theory."

Thus it appears that the conclusion of the court that defendant in error was not guilty of contributory negligence is based upon the proposition that there was no sign notifying plaintiff that electricity would jump, that there was no evidence of actual contact, and that the bubble, corroborated by the nature and location of the injuries, showed that the electricity did jump.

We shall not repeat what has already been said of the evidence on these subjects. We think the discussion already had shows clearly that the court was in error in holding that the evidence was sufficient to show that the current leaped to Sheaff's body.

If we are correct in that conclusion of course the defense of contributory negligence is completely established.

*But we feel that it is established even though the electricity did leap.* It appears without conflict that Sheaff had to take down the wires of the enclosure in order to get to the lightning arrester. When doing this he was confronted with the sign reading, "DANGER—HIGH VOLTAGE—KEEP OUT." That was a warning to him that the enclosure was a place of danger. He went to the dead side of the lightning arrester—a perfectly safe place—and dug the three holes for the cement blocks. Upon completing this work he could have

left the enclosure by the same route he entered it without being within several feet of either of the live arms. The connection between the live arms and the high tension wires overhead was in plain sight. Sheaff was an electrician's helper and must be presumed to have known at least some of the dangers of electricity. He knew the current was entering the transformer station through the high tension wires overhead because he admits hearing the purring of the transformers and recognized the sound. He knew the purring sound indicated that the electricity was passing through the transformers. The purring sound could be heard in the enclosure where the accident happened. At the very place where the accident happened Sheaff was only a few feet from the purring transformers. When he dropped his shovel after finishing the third hole, instead of leaving by the same route he entered he wandered over toward the substation with the idea of going between the ends of the live arms of the lightning arrester and the substation, a distance of only three or four feet. When he lost consciousness he was still several feet from the live arm where the bubble subsequently appeared. *He admits that he wandered toward the substation without thinking. His wandering must have taken him within one inch and three-quarters of the bubble. If he had remained two inches away from the bubble the electricity could not have leaped and he would not have been injured.*

The question is, therefore, whether or not it is contributory negligence for an electrician's helper who knows the danger of contact with live wires, to unnecessarily and without thinking place his body within one inch and three-quarters of a wire which he knows to be hot. Every one will admit that such a close approach to a known danger is of itself not only carelessness, but foolhardiness. A slight swaying of the body would cause actual contact because the space to cover would be less than an inch and three-quarters.

To recur for a moment to our skating and wading illustration: On the thin ice there is a sign reading, "DANGER—KEEP OFF." The skater ignores this sign because the ice is "innocent in appearance." It breaks and he attempts to excuse his foolhardiness by saying that the danger sign was not sufficiently explicit—that it should have said "Thin Ice".

At the point where the water was deep there was a danger sign. Ignoring this, the unfortunate woman walked into the hole and was drowned. Could her action be excused or justified by saying that the danger sign should have added the explanation, "Deep Water"?

This, it appears to us, with all due respect, is the logical effect of the reasoning of the court. Referring to the danger sign the court says: "It is not pretended that either sign contained any notice that there was any danger of the current of elec-

tricity jumping from a live wire to a person only passing or even if very close.”

The danger sign did say, however, “DANGER—HIGH VOLTAGE—KEEP OUT”.

The decision forces the conclusion that this specific sign did not give sufficient warning that the enclosure was a *danger zone* but that, on the contrary, it should have added the information “Keep away from wires—electricity will jump”.

Frankly and with the highest deference we are forced to say that we do not consider this a just or reasonable doctrine and believe that it has not the sanction of a single adjudication of any federal or state court.

If Sheaff were not negligent in voluntarily placing himself within an inch and three-quarters of the end of the live arm he would not have been negligent in going within a half or a quarter of an inch of it. In fact, he would not have been negligent no matter how close he got so long as there was not an actual touching.

We cannot believe that this is the law. Everyone, whether skilled in electricity or not, is presumed to know something of its dangers. No one of average intelligence will be permitted to deny such knowledge. The duty devolves on such a person not only to avoid actual contact with electric wires but to keep a reasonably safe distance away from them, so that accident or inadvertence will not throw him into actual contact. If Sheaff had left



as he had entered the enclosure, if he had looked about him instead of wandering into a dangerous position without thinking, if he had even exercised sufficient care to remain *two inches* from the live arm he would never have been injured.

We feel, therefore, that the defense of contributory negligence is made out even though the court should hold that the electricity jumped an inch and three-quarters. An inch and three-quarters is not far enough for an electrician's helper, exercising ordinary care for his own safety, to keep away from a wire which he has good reason to know is hot and which he has no occasion to be near. Even though he had not been an electrician's helper we think that as a man of ordinary intelligence he should be charged with the duty of keeping farther away from such a wire than an inch and three-quarters.

From what has been said it must be quite apparent that the mistake of the court as to the distance electricity will leap under such circumstances becomes vital in deciding this question. The court said that electricity would leap *at least* an inch and three-quarters. This undoubtedly means that it might leap a much greater distance. The court evidently thought that it would leap a considerable distance. When, however, it appears that it would only leap an inch and three-quarters it seems to us that the case takes on an entirely different aspect, so different, indeed, as to require reargument.

In conclusion we only desire to add that in briefing the case we did not consider it of much importance whether the current leaped or whether there was actual contact. We considered and still consider that it was just as much negligence on the part of defendant in error to voluntarily place himself within an inch and three-quarters of the live arm as to actually come in contact with it, because of the extreme danger of accidental contact from such close proximity.

However, as the distinction between a leaping current and actual contact has been made so prominent in the decision, and as we are entitled to indulge the inference that if there had been actual contact the judgment would have been reversed, we feel that justice to the plaintiff in error requires that an opportunity for a full reargument should be granted.

Plaintiff in error, therefore, respectfully asks that a rehearing be granted, and that the cause be placed upon the calendar for further consideration.

Dated, San Francisco,  
September 11, 1916.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

WM. M. CANNON,  
*Of Counsel for Plaintiff in Error  
and Petitioner.*